

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
ROOM 211  
FEDERAL BUILDING AND U.S. POST OFFICE  
225 SOUTH PIERRE STREET  
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT  
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560  
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April 12, 2005

Forrest C. Allred, Esq.  
Chapter 7 Trustee  
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Counsel for Debtors  
Post Office Box 68  
Milbank, South Dakota 57252

Subject: *In re David and Nancy A. Giere,*  
Chapter 7, Bankr. No. 04-10297

Dear Trustee and Counsel:

The matter before the Court is the Motion to Reconsider Order for Turnover filed by Debtors on April 8, 2005, and the objection thereto filed by Trustee Forrest C. Allred on April 8, 2005. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014(c). As set forth below, Debtors' Motion will be granted, and the April 8, 2005, Order for Turnover [1999 Buick Regal] will be vacated.

*Summary.* David and Nancy A. Giere ("Debtors") filed a Chapter 7 petition on September 21, 2004. Among their assets, Debtors included a 1999 Buick Regal, which they valued at \$4,000.00, and a 1994 Ford F-150 two-wheel drive pickup, which they valued at \$4,900.00. Debtors declared the Buick exempt at \$4,000.00. They also listed the Ford among their exempt property, but they valued the exemption at "\$0.00," which essentially exempted nothing. See *Soost v. NAH, Inc. (In re Soost)*, 262 B.R. 68, 72 (B.A.P. 8th Cir. 2001) (where the value of an asset exceeds the amount of the claimed exemptions, the whole asset does not become exempt).

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Debtors also stated in their schedules that the Ford was secured by Warren C. Giere, who had a held a claim of \$6,500.00 that was partially secured by the pickup, valued at \$4,900.00. On December 14, 2004, Trustee Forrest C. Allred filed a motion seeking turnover of the Ford since Debtors had not declared any of it exempt. Trustee Allred also noted in his motion that Warren Giere's claimed security interest had not been perfected. Debtors objected saying Warren Giere had now noted his lien on the vehicle title and that Debtors had declared the pickup exempt. Debtors also declared that they had a right to reaffirm the debt to Warren Giere. A hearing on the Trustee's turnover motion was held January 4, 2005, where the Court reviewed the applicable law with the parties. The motion was put on hold while Trustee Allred pursued a lien avoidance action against Warren Giere.

On January 19, 2005, Debtors amended their schedule of personalty and their schedule of property claimed exempt. Debtors decreased the value of the Ford pickup to \$2,500.00 and declared the whole \$2,500.00 exempt.

On January 20, 2005, Trustee Allred commenced his lien avoidance action against Warren Giere. A default judgment was entered February 24, 2005.

On January 21, 2005, Trustee Allred filed an objection to Debtors' amended exemptions. He essentially argued that the amendment to now declare the Ford pickup exempt was untimely. Debtors responded that a final disposition on the Trustee's turnover motion had not been made and that their amended exemptions were timely. A hearing on the Trustee's objection was held February 23, 2005. The Court ruled the amendment was timely under Fed.R.Bankr.P. 1009(a). The parties were directed to see how much unused value Debtors had remaining under S.D.C.L. § 43-45-4, with which they could declare all or a portion of the pickup value exempt, and to see whether they could reach an agreement on the value of the pickup. No agreements were reached, and an evidentiary hearing on the Trustee's turnover motion and on his objection to Debtors' amended exemptions was set for March 29, 2005. (By that time, the adversary default judgment had been entered, also.)

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On March 24, 2005, Trustee Allred filed a motion asking the Court to reschedule the hearing on the turnover motion. Therein, he stated there is now additional property that has a value above the amount claimed exempt and that he was filing a turnover motion as to that property, also. In the motion, Trustee Allred also stated:

After consultation by telephone with counsel for the Debtors, the Trustee believes that counsel for the Debtors will assert that all of the Debtors' property must be valued by the court in order to determine whether the Debtors' claimed exemptions exceed the amount allowed by statute.

The Trustee believes, and upon information and belief states, that counsel for the Debtors also believes, that both motions for turnover should be heard together, and that the value of all of the property claimed by the Debtors as exempt must be considered, and that there is not time between today and March 29, 2005, sufficient to prepare to value the vehicle subject to the Trustee's second motion for turnover, as well as the Debtors' other scheduled exemptions.

By order entered March 25, 2005, the evidentiary hearing on Trustee Allred's objection to Debtors' amended exemptions and on Trustee Allred's pickup turnover motion was rescheduled to April 19, 2005.

On March 24, 2005, the same day that he filed his motion to reschedule, Trustee Allred filed a motion for turnover regarding Debtors' Buick. While Debtors had valued the Buick at \$4,000.00 and had declared the entire value exempt, Trustee Allred said the vehicle was actually worth \$6,950.00, and he wanted the equity turned over to the bankruptcy estate. A notice was served with the objection. The notice stated that the motion would be granted unless a response was filed by April 6, 2005. The notice and Buick turnover motion were served on Debtors and their attorney. Debtors did not file a response to this turnover motion, and it was granted on April 8, 2005.

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Later on April 8, 2005, Debtors filed a Motion to Reconsider the Motion for Turnover. Debtors and their counsel stated it was their attorney's understanding that he and Trustee Allred earlier had agreed that the value of both the Ford pickup and the Buick could be litigated at the same time. They further stated that they presumed the Court understood that they were resisting the Trustee's turnover motion regarding the Buick. Based on that misunderstanding, Debtors asked that the Buick turnover order be vacated and that they be allowed to litigate the value of both vehicles at the evidentiary hearing on April 19, 2005. Debtors, in their Motion to Reconsider, also charged that Trustee Allred's "objection" regarding the Buick was untimely.

Still later on April 8, 2005, Trustee Allred responded to Debtors' Motion to Reconsider. He essentially stated there was no understanding that Debtors did not need to file a response to his Buick turnover motion. He requested that Debtors' Motion to Reconsider be denied.

*Discussion.* Debtors should have filed a response to the Trustee's Buick turnover motion. That would have kept the contested matter on track, and it would have insured that both Trustee Allred and the Court understood the basis for Debtors' objection to the turnover motion. However, because of the language in Trustee Allred's motion to reschedule, the Court can understand how Debtors' attorney assumed that the value of both the Buick and the pickup would be litigated on April 19, 2005. Accordingly, the default April 8, 2005, Buick turnover order will be vacated.

Before the April 19, 2005, evidentiary hearing, the Court wants to make sure that all parties are on the same page. Trustee Allred has on the table his objection to Debtors' amended exemptions regarding the pickup and his turnover motions regarding the pickup and the Buick.

One key issue regarding Trustee Allred's objection to exemptions was whether Debtors' amended schedule of exemptions was timely. At the February 23, 2005, hearing, the Court ruled that the amendment was timely under Fed.R.Bankr.P. 1009(a). Therefore, that objection is essentially resolved unless Trustee

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Allred can establish that the amendment was filed in bad faith. See *Ladd v. Ries (In re Ladd)*, 319 B.R. 599 (B.A.P. 8th Cir. 2005); *Kaelin v. Bassett (In re Kaelin)*, 308 F.3d 885 (8th Cir. 2002); and *In re Alderson*, Bankr. No. 89-50106, slip op. (Bankr. D.S.D. August 27, 1991).

The key issue regarding the turnover motions is the value of the vehicles. Debtors have declared the Buick exempt to the value of \$4,000.00 and the pickup, based on the amendment, exempt to the value of \$2,500.00. Via the turnover motions, Trustee Allred is seeking for the estate the value of those vehicles to the extent that the value exceeds the amount claimed exempt. Unlike an objection to exemptions, there is no deadline for a turnover motion.

An order vacating the Buick turnover order will be entered. On April 19, 2005, the Court will receive evidence on the value of the vehicles and on whether the Debtors' amended exemptions were filed in bad faith.

Sincerely,

/s/ Irvin N. Hoyt

Irvin N. Hoyt  
Bankruptcy Judge

INH:sh

CC: case file (docket original; serve parties in interest)